Supreme Court of the United States

OCTOBER TERM, 1968

No. 675

UNITED STATES OF AMERICA,

Appellant,

—v.—

JAMES D. KNOX

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

INDEX

CHRONOLOGY OF PLEADINGS

October 3, 1967	Indictment returned.
June 27, 1968	Defenses and Objections Raised to the Indictment by Defendant James D. Knox filed.
July 11, 1968	Government's Response to Defenses and Objections To the Indictment by Defendant James D. Knox filed.
July 24, 1968	Memorandum and Order of the District Court.
August 21, 1968	Notice of Appeal to the Supreme Court of the United States filed in district court.
October 22, 1968	Jurisdictional Statement filed.
April 21, 1969	Probable Jurisdiction noted.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Criminal No. 67-80-A

(Vio. 18 USC 1001, 26 USC 7203)

UNITED STATES OF AMERICA

v.

JAMES D. KNOX, GEORGE MARTIN, KEITH J. NICHOLS, BUFORD H. FOSTER, CURTIS D. BRIDGES, CARL B. MOHR

THE GRAND JURY CHARGES:

That during the fiscal period beginning on or about July 1, 1964, and ending June 30, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as definied in Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Sections 4412(a), 4412(b), and 6011 (a) of the Internal Revenue Code and the applicable regulations to make a return by registering with the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, by filing a Special Tax Return and Application for Registry—Wagering, Form 11-C; that prior to engaging in said business he did knowingly and wilfully fail to make such return in that he failed to register with and make Special Tax Return and Application for Registry—Wagering, Form 11-C, to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT TWO

That during the fiscal period beginning on or about July 1, 1964, and ending June 30, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined by Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Section 4901 of the Internal Revenue Code to pay to the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, the special occupational tax imposed by Section 4411 of the Internal Revenue Code; that prior to engaging in said business he did knowingly and wilfully fail to pay said special occupational tax to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT THREE

That during the fiscal period beginning on or about July 1, 1965, and continuing until on or about October 13, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined in Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Sections 4412(a), 4412(b), and 6011(a) of the Internal Revenue Code and the applicable regulations to make a return by registering with the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, by filing a Special Tax Return and Application for Registry—Wagering, Form 11-C; that prior to engaging in said business he did knowingly and wilfully fail to make such return in that he failed to register with and make said Special Tax Return and Application for Registry—Wagering, Form 11-C, to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT FOUR

That during the fiscal period beginning on or about July 1, 1965, and continuing until on or about October 13, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined by Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Section 4901 of the Internal Revenue Code to pay to the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, the special occupational tax imposed by Section 4411 of the Internal Revenue Code; that prior to engaging in said business he did knowingly and wilfully fail to pay said special occupational tax to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT FIVE

That on or about October 14, 1965, JAMES D. KNOX did wilfully and knowingly make and cause to be made a false and fraudulent statement and representation of a material fact in a matter within the jurisdiction of the Internal Revenue Service of the United States Treasury Department, an agency of the United States of America, in that on an Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry—Wagering, which was subscribed under the penalties of perjury and filed with the District Director of Internal Revenue for the Internal Revenue District of Austin, Austin, Texas, within the Western District of Texas, the defendant JAMES D. KNOX did state that "I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge

and belief is true, correct, and complete."; whereas in truth and in fact, as the said JAMES D. KNOX then knew, all of the statements contained in said Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry—Wagering, were not true, correct, and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and understated, in that the number, name, special stamp number, street address, and city and state of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted from said Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry—Wagering; in violation of Title 18, United States Code, Section 1001.

COUNT SIX

That on or about October 15, 1965, JAMES D. KNOX did wilfully and knowingly make and cause to be made a false and fraudulent statement and representation of a material fact in a matter within the jurisdiction of the Internal Revenue Service of the United States Treasury Department, an agency of the United States of America, in that an Internal Revenue Service Form 11-C, identified as a Supplemental Special Tax Return and Application for Registry—Wagering, which was subscribed under the penalties of perjury and filed with the District Director of Internal Revenue for the Internal Revenue District of Austin, Austin, Texas, within the Western District of Texas, the defendant JAMES D. KNOX did state that "I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete."; whereas in truth and in fact as the said JAMES D. KNOX then knew, all the statements contained in said Internal Revenue Service Form 11-C, identified as a Supplemental Special Tax Return and Application for Registry—Wagering, were not true, correct, and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and

understated in that the number, name, special stamp number, street address, and city and state of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted from said Internal Revenue Service Form 11-C, identified as a Supplemental Special Tax Return and Application for Registry—Wagering; in violation of Title 18, United States Code, Section 1001.

* * * *

[Title Omitted in Printing]

DEFENSES AND OBJECTIONS RAISED TO THE INDICTMENT BY DEFENDANT JAMES D. KNOX

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JAMES D. KNOX, Defendant in the above styled and numbered cause, and pursuant to the provisions of *Criminal Rule 12 (b)*, timely raises the following defenses and objections to the indictment, challenging the counts in which he is charged:

* * * *

IV.

Each of the counts is predicated upon a statute invalid, void and unconstitutional under the Constitution of the United States and the Amendments thereto, particularly the Fifth Amendment to the Constitution of the United States, for the reason, among others, that the statute 26 U.S.C.A. 4412 and 6011, including the regulations issued pursuant thereto, require the Defendant to give information that would incriminate him or tend to incriminate him, under the penal laws of the United States and of the State of Texas.

Either the making of the Special Tax Return Application for Registry—Wagering, Form 11-C or the purchase of the Special Tax Stamp required by the Statutes and aforementioned regulations pursuant thereto would cause and require the Defendant to give information that would

incriminate him or tend to incriminate him under the penal laws of the United States and the State of Texas, contrary to the immunities guaranteed by the Constitution of the United States, the Amendments thereto, particularly the Fifth Amendment.

For this reason the foregoing statutes, and the related penal statue, 26 U.S.C.A. 7203, are unconstitutional.

To impose penal sanctions under the provisions of 26 U.S.C.A. 7203 for a failure to give information that would incriminate, or tend to incriminate, the defendant under the penal laws of the United States and of the State of Texas, would be to punish a citizen criminally because of his claim of immunities guaranteed to him by the Constitution of the United States, the Amendments thereto, and particularly the Fifth Amendment.

* * * *

[Title Omitted in Printing]

BRIEF IN SUPPORT OF GOVERNMENT'S RESPONSE TO DEFENDANT'S DEFENSES AND OBJECTIONS TO THE INDICTMENT BY DEFENDANT JAMES D. KNOX

Comes now the United States of America, by and through its representative, and would represent to the Court that with respect to Defendant JAMES D. KNOX, the government intends to pursue only the charges contained in Counts Five and Six of the indictment, and would respectfully submit that the defendant's defenses and objections to Counts Five and Six of the indictment should be overruled for the reasons stated herein.

* * * *

IV.

The objections contained in paragraph IV of defendant's *Defenses and Objections* are largely irrelevant to Counts Five and Six of the indictment.

* * * *

[Title Omitted in Printing]

MEMORANDUM AND ORDER

Came on this day for consideration by this Court, the motion of the defendant, JAMES D. KNOX, in the above styled and numbered cause, applying to this Court for a dismissal of the indictment, which the parties agreed to have decided without oral argument.

The Court grants the dismissal on the authority of Marchetti v. United States, 390 U.S. 40 (1968) and Grosso v. United States, 390 U.S. 63 (1968).

The indictment alleges that the Defendant violated Title 18, United States Code, Section 1001 (1964) by wilfully and knowingly making a false statement on Internal Revenue Form 11-C, Special Tax Return and Application for Registry—Wagering.

In general, the Marchetti and Grosso cases held that the privilege against self-incrimination bars prosecution under the federal wagering tax statutes. This case is controlled specifically by Grosse [sic], which held that the petitioner there could not be convicted of conspiracy to evade payment of the excise tax on wagering "if the constitutional privilege would properly prevent his conviction for wilful failure to pay it." Id. at 70. Similarly, the indictment in this case is based on the defendant's alleged failure to answer the wagering form correctly, and the constitutional privilege against self-incrimination would have prevented prosecution for failure to answer the form in any respect.

It is therefore ORDERED, ADJUDGED and DECREED that the motion be, and is hereby, granted.

Signed at Austin, Texas, this 24th day of July, 1968.

/s/ Jack Roberts
JACK ROBERTS
United States District Judge

[Title Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order entered in the above entitled case on July 24, 1968, dismissing the indictment against defendant JAMES D. KNOX charging violation of 18 USC 1001.

This appeal is taken pursuant to 18 USC 3731.

Respectfully submitted,

ERNEST MORGAN
United States Attorney

By /s/ Jeremiah Handy
JEREMIAH HANDY
Assistant U. S. Attorney

[Certificate of Service Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 675, October Term, 1968

UNITED STATES, APPELLANT

v.

JAMES D. KNOX

APPEAL from the United States District Court for the Western District of Texas.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar and set for oral argument immediately following No. 934.

April 21, 1969

10 470003

U.S. Treasury Department—Internal Revenue Service

FORM 11-C
Rev. July 1963

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

Return for period from 10-14-65 to June 30, 19...
(Month, day, and year)

Check one: ☑ First return and application ☐ Renewal return and application ☐ Supplemental return and application

For District Director's Use Only

(Stamp number)

(Date issued)

74-6553-P
(Registration number)

Tax $ 37.50
Penalty $
Interest $
Total $ 37.50

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

1. Name: True name James O'Brien
Alias, style, or trade name, if any None

2. Address: Residence 2506 Martha Lane
(Number and street)
Pasadena (City) Harris (County) Texas (State)
Business 4618 Red Bluff Rd
(Number and street)
Pasadena (City) Harris (County) Texas (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)
None

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Name address
None	

OCT 14 1965
74
AUSTIN
HOUSTON OFFICE

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☑ Yes ☐ No (Check one)
If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name of location	Street address	City and State
2506 Martha Lane K+K Drive In	2506 Martha Lane 4618 Red Bluff Rd	Pasadena Texas Pasadena Texas

(b) Number of employees and/or agents engaged in receiving wagers on your behalf None

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State
None			

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☑ No (Check one)
If yes, give true name and address of each such person.

True name	Street address	City and State
None		

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

10-14 (Date), 1965 James O'Brien (Signature)

(State whether individual owner, member of firm, or if corporation officer, give title)

U.S. Treasury Department—Internal Revenue Service

FORM 11-C
Rev. July 1963

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

Return for period from 10-15-65 (Month, day, and year) to June 30, 1966

Check one: ☐ First return and application ☐ Renewal return and application ☒ Supplemental return and application

1. Name: True name James D Hurst

Alias, style, or trade name, if any

2. Address: Residence 2506 Martha Lane (Number and street) Pasadena (City) Harris (County) Texas (State)

Business 4916 Red Bluff Rd (Number and street) Pasadena (City) Harris (County) Texas (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

To list Name & address of agent's

Stamp not to Issued Yet

(If additional space is required for Items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

OCT 15 1965
74
DIR. INT. REV.
AUSTIN
HOUSTON OFFICE

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☒ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Trade name	Street address	City and State
# K7K Dixie in	4618 Red Bluff Rd	Pasadena Texas
2506 Martha Lane		Pasadena Texas

(b) Number of employees and/or agents engaged in receiving wagers on your behalf 3

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. to present use	Street address	City and State
B. H. Foster	✓	901 Elm	Pasadena Texas
C. D. Bridges	✓	919 Hector	Pasadena Texas
Keith JaBear Nichols	✓	304 Randell	Pasadena Texas

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☒ No (Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

10-15-65 (Date) 19 James D Hurst (Signature) Owner (State whether individual owner, member of firm, or if corporation officer, give title)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 349469 669

FORM 11-C
Rev. July 1963

U.S. Treasury Department—Internal Revenue Service

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

Return for period from ..... (Month, day, and year) **to June 30, 19**.....

Check one: ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

For District Director's Use Only

..... (Stamp number)

..... (Date issued)

..... (Registration number)

Tax..... $.....
Penalty..... $.....
Interest..... $.....
Total..... $

1. Name: True name .....

Alias, style, or trade name, if any .....

2. Address: Residence ..... (Number and street)

..... (City) (County) (State)

Business ..... (Number and street)

..... (City) (County) (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

.....

.....

.....

.....

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name of location	Street address	City and State
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

(b) Number of employees and/or agents engaged in receiving wagers on your behalf .....

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☐ No (Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

SIGNATURE AND VERIFICATION

..... application (including any accompanying statements or lists) has

INSTRUCTIONS

1. Who Must File.—Every person who is liable for the 10-percent excise tax imposed by section 4401 of the Internal Revenue Code, and every person who is engaged in receiving wagers for or on behalf of any person so liable, is subject to a special tax of $50 per year imposed by section 4411 of the Code, and must file Form 11-C.

Section 4421 of the Code defines the term "wager" to mean (1) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (3) any wager placed in a lottery conducted for profit.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (1) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under sections 501 and 521 of the Code, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

2. When To File.—(a) First and Renewal Returns and Applications for Registry—Form 11-C serves two purposes: (A) A special tax return and (B) an application for registry. The first return and application for registry must be filed prior to engaging in the activity which results in liability for the special tax on wagering. Renewal returns and applications are required to be filed on or before July 1 of each year thereafter during which taxable activity continues. Changes in ownership which require a return and application for registry, and which result in special tax liability, include the following:

(1) Admission of new members to a firm or partnership.

(2) Formation of a corporation to continue the business of a partnership.

(3) Continuance of the corporate business by a stockholder after the corporation is dissolved.

(b) Supplemental Applications for Registry.—Change of place of business or residence address must be registered with the District Director of Internal Revenue by filing a Form 11-C and checking the block designated "Supplemental Return and Application," stating the new address and the date of change before (i) he engages in any wagering activity at the new address, or (ii) the termination of a 30-day period which begins on the day after the date of such change whichever occurs first. Any other change must also be registered within 30 days after such change; examples of such other changes include the following: (1) Continuance of the operation of a business of a deceased person, who has paid the special tax, by the surviving spouse or child, or executor or administrator, or other legal representative, (2) Continuance of a business by a receiver or trustee in bankruptcy, (3) Continuance of a business by an assignee for the benefit of creditors, (4) Withdrawal from a firm or partnership of one or more members, and (5) Mere change of corporate name. Failure to comply with these requirements will result in additional tax and penalty. The taxpayer's special tax stamp shall accompany such supplemental application for proper notation by the District Director.

An individual accepting wagers on his own account shall register, by filing a Form 11-C designated "Supplemental Return" not later than 10 days after engaging a new agent or employee to receive wagers, the name, address, and number appearing on the special tax stamp of each such agent or employee. Likewise, an agent or employee receiving wagers on behalf of another shall register the name and address of each additional person by whom he is engaged to receive wagers within 10 days after he is so engaged.

3. Where To File.—The return must be filed with the District Director of Internal Revenue for the district in which is located the taxpayer's office or principal place of business or, if he has no office or principal place of business in the United States, with the District Director for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return must be filed with the District Director of Internal Revenue, Baltimore, Maryland, 21203.

4. Computation of the Special Tax on Wagering.—Special tax liability is computed from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July, the tax to be remitted is computed by multiplying the monthly rate of $4.16⅔ by the number of months remaining in the fiscal year. If the resulting amount involves a fraction, the full cent must be included. Example: If a person first commences business in November, liability should be computed as follows: $4.16⅔×8 (the number of months remaining in the fiscal year) equals $33.33⅓, or $33.34, the amount to be remitted.

5. Penalties.—If the return is not filed with the District Director prior to engagement in the activity which results in liability for the occupational tax on wagering, the penalty prescribed by sections 6651 and 6653 of the Internal Revenue Code may be incurred. In addition, under the provisions of section 7262 of the Code any person who does any act which makes him liable for the special tax, without having paid such tax, shall be fined not less than $1,000 and not more than $5,000. Section 7273 (b) provides that any person who fails to post or exhibit special wagering tax stamps in accordance with section 6806 (c) shall be liable to a penalty of $50 if failure to comply is due to negligence or $100 if due to willful neglect or refusal. For willful failure to file a return or pay the tax, the penalties under sections 7201 and 7203 may be imposed. Under the general provisions of section 1001 of Title 18 of the United States Code, whoever knowingly makes any false or fictitious statement with respect to the payment of the special tax, such as the giving of a false name or address, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES D. KNOX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum and order of the United States District Court for the Western District of Texas (Appendix A, *infra,* pp. 8–9) is not yet reported.

JURISDICTION

On July 24, 1968, the district court entered an order dismissing the indictment charging appellee with violation of 18 U.S.C. 1001 on the ground that prosecution under that statute is barred by his privilege against self-incrimination. Notice of appeal to this Court was filed on August 21, 1968. The jurisdiction of this Court rests on Section 3731 of Title 18, United

States Code, which authorizes the government to appeal directly from a decision sustaining a motion in bar, when the defendant has not been put in jeopardy. See *United States* v. *Blue,* 384 U.S. 251; *United States* v. *Murdock,* 284 U.S. 141.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

QUESTION PRESENTED

Whether this Court's decision in *Marchetti* v. *United States,* 390 U.S. 39, which bars prosecution for failure to comply with the registration requirements of the wagering tax laws upon a proper claim of the privilege against self-incrimination, also requires dismissal of an indictment charging one who voluntarily registered with knowingly and willfully making false statements in his registration forms.

STATEMENT

Appellee James Knox was indicted, together with a number of other defendants, in a multi-count indict-

ment. The first four counts charged Knox with violations of 26 U.S.C. 7203 based on the failure to file special tax returns and applications for registry as required by 26 U.S.C. 4412 and 4901, for the fiscal years 1964 and 1965; counts five and six charged him with violations of 18 U.S.C. 1001 stemming from alleged false statements of material fact contained in a special tax return and in a supplemental special tax return filed on October 14 and October 15, 1965, respectively.[1] These latter two counts alleged that Knox subscribed to the returns and applications (Internal Revenue Form 11–C) under the penalties of perjury and that he knew at the time of filing that the forms misrepresented "the number of employees and/or agents engaged in receiving wagers in his behalf."

Appellee moved to dismiss the indictment on the ground that the wagering tax laws and the regulations promulgated thereunder were invalid in that they required the registrant to give information that would incriminate or tend to incriminate him. This contention was also made with regard to "all other interrelated statutes" upon which the charges against him were predicated. In response, the government asserted its intention to prosecute only under counts five and six of the indictment, recognizing that prosecution under the first four counts was barred by this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, and, as to the fifth and sixth counts, it opposed dismissal.

[1] The first six counts of the indictment are reprinted in Appendix B, *infra*, pp. 10–14.

Relying upon *Marchetti* and *Grosso,* the district court dismissed all counts of the indictment—including those charging violations of Section 1001. It held that Knox could not be prosecuted for his "failure to answer the wagering form correctly" since his "constitutional privilege against self incrimination would have prevented prosecution for failure to answer the form in any respect" (Appendix A, *infra,* p. 9).

THE QUESTION IS SUBSTANTIAL

1. In dismissing the counts charging false statements under 18 U.S.C. 1001, the district court seriously misinterpreted the *Marchetti* and *Grosso* decisions. This Court there held only that the proper assertion of the privilege against self-incrimination bars prosecution for failing to comply with the registration and reporting requirements of the wagering tax laws; neither directly nor by implication do these rulings suggest that one who does comply may, with impunity, do so falsely. As the Court said in *Marchetti, supra,* 390 U.S. at 61:

> We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold *only* that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for *failure* to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is *otherwise outside the privilege's protection,* nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes. [Emphasis added.]

2. The district court's ruling was plainly contrary to this Court's decision in *Dennis* v. *United States,* 384 U.S. 855. In that case the petitioners were charged with conspiring, in the years 1949–1955, to obtain the services of the National Labor Relations Board on behalf of the union of which they were officers by filing affidavits falsely denying their Communist Party affiliations in an attempt to satisfy the requirements of Section 9(h) of the Taft-Hartley Act. Congress had repealed Section 9(h) and had substituted for it Section 504 of Title 29, which made it a crime for any member of the Communist Party to hold union office. Section 504 had thereafter been held unconstitutional as a bill of attainder in *United States* v. *Brown,* 381 U.S. 437. Relying on the *Brown* decision, the *Dennis* petitioners asked this Court to reconsider the constitutionality of Section 9(h), the validity of which had been sustained in *American Communications Assn.* v. *Douds,* 339 U.S. 382. In declining to reach that constitutional issue, the Court said (384 U.S. at 865–866):

> * * * [P]etitioners are in no position to attack the constitutionality of § 9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported compliance with the stat-

> ute designed to avoid the courts, not to invoke their jurisdiction.
>
> It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. Ample opportunities exist in this country to seek and obtain judicial protection. There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to challenge. * * *

The *Dennis* rationale clearly governs the instant case. Thus, the appellee here, with "cynical and fraudulent" intent, sought to evade the penalty imposed on those who fail to comply with the requirements of Section 4412 by providing the government with false information. Granting that he cannot be punished for having failed to register under Section 4412 (just as the petitioners in *Dennis* sought to contend that they could not have been punished for failing to file the affidavits required by Section 9(h)), it is nonetheless true that, having elected "such a course as a means of self-help [he] may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional." *Dennis* v. *United States,* 384 U.S. at 867. Indeed, the present case is an even stronger one than *Dennis* for the application of this principle because it has long been held that the privilege against self-incrimination may be waived by failure to assert it in a timely and proper manner. See,

e.g., Rogers v. *United States,* 340 U.S. 367, 372–375; *Brown* v. *Walker,* 161 U.S. 591, 597.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.[2]

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
JEROME M. FEIT,
CHARLES RUFF,
Attorneys.

OCTOBER 1968.

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[2] If the Court agrees with our submission that the issue raised in this appeal is plainly governed by the decision in *Dennis* v. *United States, supra,* it may deem this case appropriate for summary reversal.

APPENDIX A

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

(Criminal Number 67-80-A)

UNITED STATES OF AMERICA VS. JAMES D. KNOX

MEMORANDUM AND ORDER

Came on this day for consideration by this Court, the motion of the defendant, James D. Knox, in the above styled and numbered cause, applying to this Court for a dismissal of the indictment, which the parties agreed to have decided without oral argument.

The Court grants the dismissal on the authority of Marchetti v. United States, 390 U.S. 40 (1968) and Grosso v. United States, 390 U.S. 63 (1968).

The indictment alleges that the Defendant violated Title 18, United States Code, Section 1001 (1964) by wilfully and knowingly making a false statement on Internal Revenue Form 11-C, Special Tax Return and Application for Registry-Wagering.

In general, the Marchetti and Grosso cases held that the privilege against self-incrimination bars prosecution under the federal wagering tax statutes. This case is controlled specifically by Grosse [sic] which held that the petitioner there could not be convicted of conspiracy to evade payment of the excise tax on wagering "if the constitutional privilege would properly prevent his conviction for willful failure to pay it." Id. at 70. Similarly, the indictment in this case is based

on the defendant's alleged failure to answer the wagering form correctly, and the constitutional privilege against self-incrimination would have prevented prosecution for failure to answer the form in any respect.

It is therefore ORDERED, ADJUDGED and DECREED that the motion be, and is hereby, granted.

Signed at Austin, Texas, this 24th day of July, 1968.

JACK ROBERTS,
United States District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

(Criminal No. 67-80-A, Vio. 18 U.S.C. 1001, 26 U.S.C. 7203)

UNITED STATES OF AMERICA v. JAMES D. KNOX, GEORGE MARTIN, KEITH J. NICHOLS, BUFORD H. FOSTER, CURTIS D. BRIDGES, CARL B. MOHR

THE GRAND JURY CHARGES

That during the fiscal period beginning on or about July 1, 1964, and ending June 30, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined in Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Sections 4412(a), 4412(b), and 6011(a) of the Internal Revenue Code and the applicable regulations to make a return by registering with the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, by filing a Special Tax Return and Application for Registry-Wagering, Form 11-C; that prior to engaging in said business he did knowingly and wilfully fail to make such return in that he failed to register with and make said Special Tax Return and Application for Registry-Wagering, Form 11-C, to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT TWO

That during the fiscal period beginning on or about July 1, 1964, and ending June 30, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined by Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Section 4901 of the Internal Revenue Code to pay to the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, the special occupational tax imposed by Section 4411 of the Internal Revenue Code; that prior to engaging in said business he did knowingly and wilfully fail to pay said special occupational tax to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT THREE

That during the fiscal period beginning on or about July 1, 1965, and continuing until on or about October 13, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined in Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Sections 4412(a), 4412(b) and 6011(a)

of the Internal Revenue Code and the applicable regulations to make a return by registering with the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, by filing a Special Tax Return and Application for Registry—Wagering, Form 11–C; that prior to engaging in said business he did knowingly and wilfully fail to make such return in that he failed to register with and make said Special Tax Return and Application for Registry—Wagering, Form 11–C, to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT FOUR

That during the fiscal period beginning on or about July 1, 1965, and continuing until on or about October 13, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined by Section 4421(1) of the Internal Revenue Code; that prior to engaging in said he was required by Section 4901 of the Internal Revenue Code to pay to the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, the special occupational tax imposed by Section 4411 of the Internal Revenue Code; that prior to engaging in said business he did knowingly and wilfully fail to pay said special occupational tax to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT FIVE

That on or about October 14, 1965, JAMES D. KNOX did willfully and knowingly make and cause to be made a false and fraudulent statement and representation of a material fact in a matter within the jurisdiction of the Internal Revenue Service of the United States Treasury Department, an agency of the United States of America, in that on an Internal Revenue Service Form 11–C, Special Tax Return and Application for Registry-Wagering, which was subscribed under the penalties of perjury and filed with the District Director of Internal Revenue for the Internal Revenue District of Austin, Austin, Texas, within the Western District of Texas, the defendant JAMES D. KNOX did state that "I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete."; whereas in truth and fact, as the said JAMES D. KNOX then knew, all of the statements contained in said Internal Revenue Service Form 11–C, Special Tax Return and Application for Registry-Wagering, were not true, correct, and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and understated, in that the number, name, special stamp number, street address, and city and state of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted from said Internal Revenue Service Form 11–C, Special Tax Return and Application for Registry-Wagering; in violation of Title 18, United States Code, Section 1001.

COUNT SIX

That on or about October 15, 1965, JAMES D. KNOX did willfully and knowingly make and cause to be made a false and fraudulent statement and representation of a material fact in a matter within the jurisdiction of the Internal Revenue Service of the United States Treasury Department, an agency of the United States of America, in that an Internal Revenue Service Form 11–C, identified as a Supplemental Special Tax Return and Application for Registry-Wagering, which was subscribed under the penalties of perjury and filed with the District Director of Internal Revenue for the Internal Revenue District of Austin, Austin, Texas, within the Western District of Texas, the defendant JAMES D. KNOX did state that "I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete."; whereas in truth and in fact as the said JAMES D. KNOX then knew, all the statements contained in said Internal Revenue Service Form 11–C, identified as a Supplemental Special Tax Return and Application for Registry-Wagering, were not true, correct, and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and understated in that the number, name, special stamp number, street address, and city and state of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted from said Internal Revenue Service Form 11–C, identified as a Supplemental Special Tax Return and Application for Registry-Wagering; in violation of Title 18, United States Code, Section 1001.

U.S. GOVERNMENT PRINTING OFFICE: 1966

NO. 17

IN THE

Supreme Court of the United States

October Term, 1968

UNITED STATES OF AMERICA, *Appellant*

v.

JAMES D. KNOX, *Appellee*

On Appeal from the United States District Court for the Western District of Texas

MOTION TO DISMISS OR AFFIRM

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Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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LIST OF AUTHORITIES

NO. 675

IN THE

Supreme Court of the United States

October Term, 1968

UNITED STATES OF AMERICA, *Appellant*

v.

JAMES D. KNOX, *Appellee*

MOTION TO DISMISS OR AFFIRM

The Appellee, James D. Knox, pursuant to Rule 16, Paragraph 1(c) and (d) moves that the appeal be dismissed or alternatively that the judgment of the District Court be affirmed.

QUESTIONS PRESENTED

I. Whether a false statement prosecution under 18 U. S. C. A. 1001 can be maintained on allegations of failure to answer questions 5(b) and 5(c) of Internal Revenue Service Form 11-C?

II. Whether under *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697, and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709, Appellee could refuse to

answer questions 5(b) and 5(c) submitted in Internal Revenue Service Form 11-C, when affirmative answers to these questions would have incriminated him under penal statutes imposing greater penalties than those under which he incriminated himself when he answered the other questions?

STATEMENT

The Government bases its appeal solely on Counts Five and Six of the Indictment. The graveman of each charge is that Appellee failed to answer certain questions in Internal Revenue Service Form 11-C[1] Examination of this form in relation to Counts Five and Six discloses that the questions the Government charges were not answered are Nos. 5(b) and 5(c) of said form.

ARGUMENT

I.

Neither Count Five nor Count Six of the indictment charges an affirmative false statement; they charge only failures to answer questions 5(b) and 5(c) of Internal Revenue Service Form 11-C. It seems fundamental that failure to answer a question or to make a statement can not be a false statement. Consequently, the counts do not charge false and fraudulent statements under 18 U.S.C.A. 1001. Counsel's research has produced no Federal decisions directly on the point but state court precedents hold that charges of perjury or false statements can not be grounded on failure to make statements,

1. Photocopy of Internal Revenue Form 11-C is reproduced as Appendix A, P. 7.

no matter how material the statements, if made, may have been. *People v. French* (Calif. 1933), 26 Pac. 2d 310; *People v. Dodge* (N. Y. 1961), 12 A.D.2d 353, 212 New York Supp. 2d 526.

The State in *People v. French,* supra, charged that the defendant filed an application to Los Angeles County for poor person relief without including with the application a list of properties in which he claimed a legal or equitable interest: ". . . And the Defendant in said affidavit did willfully and intentionally fail to state the nature, location and value of all property in which he, the said Defendant, had any interest."

It was the State's contention that the failure to furnish this information, which was required by the poor relief ordinance, constituted false statements or perjury. However, the Court affirmed a dismissal of the indictment on the fundamental premise that a failure to make a statement can not be a perjurious false statement:

> "It would seem so clear that discussion should be unnecessary either to illustrate or to establish the point that a criminal action against a defendant for the commission by him of the crime of perjury cannot be maintained on an allegation that in making an affidavit he failed to make a statement of any fact, however relevant or material such fact, if made, might be to the subject-matter in hand, or however mandatory the rule might be by which he was directed or required to make such statement as a prerequisite to the accomplishment of the object of the affidavit."

In *People v. Dodge,* supra, it was argued by the prosecution that certain petitions to a City Council should be

construed to contain false staetments, because the Ordinance under which the petition was filed required allegations of certain facts which were not stated in the petition. The Court rejected the contention, holding that charges of perjury or false statements can not be based on failures to make statements:

> "It has been argued that the petitions should be read as containing the false statements alleged to have been made because the ordinance required proof of such facts as a prerequisite to the grant of relief, and the petitions were presented pursuant to the ordinance. As we have stated, the ordinance did not require proof; but even if it did, a failure to make the statements alleged to have been made would not have constituted perjury. Perjury is not committed by failing to make a statement of a fact, no matter how relevant or material such statement, if made, might be to the subject matter in hand, and no matter how mandatory the rule might be requiring such statement to be made as a prerequisite to the accomplishment of the purpose of an affidavit."

To construe 18 U.S.C.A. 1001 as contended for by the Government would result in the flagrant injustices of subjecting every citizen to a criminal prosecution whenever he failed to answer a question or fill out a blank in any of the myriad forms daily submitted by the thousands to the innumerable Governmental agencies and bureaus. It is urged such was not the intent of Congress in enacting §1001, that it did not intend to abrogate the age-old concepts of perjury or false statements and to subject a citizen to five years in prison and a $1,000.00 fine for failure to fill out all the blanks in an agency form.

Analogous unintended results have been avoided by the lower courts in construing §1001. It does not penalize statements as to what might be in the future; the truth or falsity of such are incapable of proof as of the time the statements are made. *Kolaski v. United States* (5th Cir.), 362 F.2d 847. Mere negative, oral answers to questions propounded by Federal investigators are not "statements" within the meaning of §1001. *Paternostro v. United States* (5th Cir.), 311 F.2d 298; *United States v. Stark* (D.C. Md.), 131 F. Supp. 88; *United States v. Levin* (D. C. Col.), 133 F. Supp. 88.

II.

Under his Fifth Amendment immunity Knox could have refused to answer any of the questions submitted in Internal Revenue Service Form 11-C. *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709; *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697. Though he waived this immunity as to those questions answered, it is a proper extension of *Grosso* and *Marchetti* that he could nevertheless claim his immunity to the questions not answered if to answer them would incriminate him as to other and more onerous penal statutes.

By answering the questions other than 5(b) and 5(c), Knox incriminated himself under the *Texas Bookmaking Statute, Texas Penal Code,* Art. 652(a), §1, which allows a minimum penalty of only ten days in jail and a $100.00 fine.[2] However, had he answered questions 5(b) and 5(c) and had such answers disclosed the names of persons assisting him in bookmaking he would have in-

2. This statute is quoted in Appendix B, P. 8.

criminated himself under the Texas *Conspiracy Statutes, Texas Penal Code,* Arts. 1622-1629, which provide for a minimum penalty of two years in the state penitentiary.[3] It is respectfully urged that the Fifth Amendment protects his avoiding incriminating himself under these more onerous provisions of the *Texas Penal Code.*

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the United States District Court for the Western District of Texas should be affirmed, or that the appeal should be dismissed.

Respectfully submitted,

J. EDWIN SMITH
Attorney for Appellee
1401 South Coast Building
Houston, Texas

3. The materal portions of these statutes are quoted in Appendix C, P. 9.

APPENDIX A

FORM 11-C
Rev. July 1963

U.S. Treasury Department—Internal Revenue Service

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

Return for period from _____ (Month, day, and year) to June 30, 19____

Check one: ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

For District Director's Use Only

_____ (Stamp number)

_____ (Date issued)

_____ (Registration number)

Tax..... $_____

Penalty..... $_____

Interest..... $_____

Total..... $

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

1. Name: True name _____

Alias, style, or trade name, if any _____

2. Address: Residence _____ (Number and street)

_____ (City) _____ (County) _____ (State)

Business _____ (Number and street)

_____ (City) _____ (County) _____ (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

_____

_____

_____

_____

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name or location	Street address	City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf _____

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. to present use	Street address	City and State

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☐ No (Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

_____, 19____ _____ _____

(Date) (Signature) (State whether individual owner, member of firm, or if corporation officer, give title)

APPENDIX B

TEXAS PENAL CODE

Art. 652a. *Bookmaking; definition; penalty*

Accepting or placing wagers; punishment

Section 1. Any person who takes or accepts or places for another a bet or wager of money or anything of value on a horse race, dog race, automobile race, motorcycle race or any other race of any kind whatsoever, football game, baseball game, athletic contest or sports event of whatsoever kind or character; or any person who offers to take or accept or place for another any such bet or wager; or any person who as an agent, servant or employee or otherwise, aids or encourages another to take or accept or place any such bet or wager; or any person who directly or indirectly authorizes aids or encourages any agent, servant or employee or other person to take or accept or place or transmit any such bet or wager shall be guilty of book making and upon conviction be punished by confinement in the State Penitentiary for any term of years not less than one (1) nor more than five (5) or by confinement in the county jail for not less than ten (10) days nor more than one (1) year and by a fine of not less than One Hundred ($100.00) Dollars nor more than One Thousand ($1,000.00) Dollars.

APPENDIX C

TEXAS PENAL CODE

CONSPIRACY

Art. 1622. [1433-1437] Definition

A conspiracy is an agreement entered into between two or more persons to commit a felony.

Art. 1623. [1434] [954] [801] When Conspiracy Complete

The offense of conspiracy is complete, although the parties conspiring do not proceed to effect the object for which they have so unlawfully combined.

Art. 1626. [1438] [958] [805] Punishment for Conspiracy

Conspiracy to commit murder shall be punished by confinement in the penitentiary not less than two nor more than ten years. Conspiracy to commit any other felony shall be punished by confinement in the penitentiary not less than two nor more than five years.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 675

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES D. KNOX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

In moving to dismiss the appeal or, in the alternative, to affirm the judgment of the district court, appellee has set forth two distinct arguments: first, that the indictment does not charge an offense under 18 U.S.C. 1001 in that it alleges only a failure to answer certain questions on the Special Tax Return and Registry (Internal Revenue Service Form 11–C); and second that, in failing to answer those questions, appellee has preserved his privilege against self-incrimination as to the issue of his employment of agents.[1]

[1] If appellee wished to assert his privilege against self-incrimination as to any specific questions, he should have so stated on the Form 11–C at the time of filing. *United States* v. *Sullivan*, 274 U.S. 259.

337-171—69

With regard to the former contention, it should be pointed out that Counts Five and Six of the indictment (J.S. App. 13–14) charge not mere failure to answer, but rather "that the number of employees and/or agents * * * [was] misrepresented and understated, in that the number, name [etc.] * * * had been omitted" from the Form 11–C, which petitioner had declared to be "true, correct, and complete" to the best of his knowledge.

In any event, whether there was, in fact, only a failure to answer and whether appellee sought to assert his privilege against self-incrimination are questions which cannot be answered on the record now before the Court. The only issue presented by the dismissal of the indictment against the appellee is the availability of his privilege against self-incrimination as a defense to the charge that he falsified his wagering registration form. Appellee has asserted matters which, if he is able to establish the necessary factual support for them, may constitute defenses to the charges against him, but this appeal is not the appropriate context for their resolution. See *United States* v. *Fruehauf*, 365 U.S. 146.

For these reasons and for those set out in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted or, as previously suggested, that the judgment should be reversed and the case remanded for trial.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
CHARLES RUFF,
Attorneys.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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CITATIONS

355-694—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 17

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES D. KNOX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order and memorandum of the district court dismissing the indictment (A. 8) has not been reported.

JURISDICTION

The order of the district court was entered on July 24, 1968. The notice of appeal was filed on August 21, 1968. This Court noted probable jurisdiction on April 21, 1969 (394 U.S. 971). The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes the government to appeal directly from a decision sustaining a motion in bar, when the defendant has not been put in jeopardy.

QUESTION PRESENTED

Whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, require the dismissal of an indictment charging one who registered under the wagering tax laws with knowingly and willfully making false statements in the registration forms he filed.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

26 U.S.C. 4412 provides, in pertinent part:

> (a) Requirement.
>
> Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> (1) his name and place of residence;
>
> (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; * * *

STATEMENT

On October 3, 1967, a twenty-four count indictment against appellee and others was returned in the United States District Court for the Western District of Texas. Appellee was named in the first six counts (A. 2-6). Counts one through four charged that during the period July 1, 1964, to October 13, 1965, appellee had engaged in the business of accepting wagers, but had failed to file Internal Revenue Service Form 11–C, the special wagering tax return and registration application required by 26 U.S.C. 4412, and had also failed to pay the occupational tax imposed by 26 U.S.C. 4411. Count five charged that on a Form 11–C which appellee did file on October 14, 1965, he knowingly and willfully made false statements, in violation of 18 U.S.C. 1001. Count six charged similar false statements made in a supplemental form filed on October 15, 1965. The alleged misrepresentations involved understating the number of employees and agents engaged in receiving wagers on appellee's behalf.

After this Court decided *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, appellee filed his "Defenses and Objections Raised to the Indictment," in which he alleged that the wagering tax laws and the regulations issued pursuant thereto were constitutionally invalid in that they compelled those required to register to give information incriminating under State law (A. 6–7). In its response, the government stated that it would pursue only the charges contained in counts five and six, and argued

that, as to these counts, appellee's objections were "largely irrelevant" (A. 7). The district court granted appellee's motion to dismiss in its entirety, however, stating that its decision dismissing the counts charging false statements was controlled by *Grosso,* where this Court reversed a conviction for conspiracy to violate the wagering tax laws as well as a conviction on substantive counts, on the ground that prosecution was barred by assertion of the privilege against self-incrimination (A. 8). The court below reasoned that since the privilege "would have prevented prosecution for failure to answer the form in any respect," appellee could not be prosecuted for his "alleged failure to answer the wagering form correctly" (*ibid.*).

SUMMARY OF ARGUMENT

Marchetti and *Grosso,* relied upon by the district court as authority for dismissal of the indictment, including the counts under 18 U.S.C. 1001, are not controlling here. The act of submitting false statements differs significantly from the failure to comply at all with the registration requirements of the wagering tax laws. It is not a direct challenge to the validity of a statute, but rather a calculated attempt to deceive and mislead the government through feigned or purported compliance. Accordingly, the charge of submitting false statements does not automatically fall because appellee could have invoked the privilege against self-incrimination as a complete defense to a charge of failure to register. *Grosso* v. *United States,* 390 U.S. 62, which struck down an indictment for conspiracy as well as failure to comply with the sub-

stantive provisions, does not hold otherwise, since the conspiracy there was one to evade payment of wagering taxes by failing to register. In the instant case, on the other hand, the essence of the false statement counts of the indictment is the making of fraudulent misrepresentations to the government. Thus, for reasons elaborated more fully in our brief in *Bryson* v. *United States,* No. 35, 1969 Term, the district court erred in dismissing the false statement counts of the indictment, which properly charged violations of 18 U.S.C. 1001.

ARGUMENT

THE FACT THAT APPELLEE WOULD HAVE HAD A VALID DEFENSE TO A CHARGE OF FAILURE TO REGISTER DOES NOT JUSTIFY HIS WILLFULLY FALSE STATEMENTS WHEN HE DID REGISTER IN PURPORTED COMPLIANCE WITH THE WAGERING TAX LAWS

The counts of the indictment against appellee that are involved in this appeal charge him with deliberately endeavoring to deceive the government by filing registration statements under the wagering tax laws that misrepresented the number of persons who received wagers on his behalf. Question 5(b) of the forms that appellee filled out and filed (App. 13) asks the registrant to state, as 26 U.S.C. 4412(a)(2) requires, the "[N]umber of employees and/or agents engaged in receiving wagers on your behalf," and question 5(c) asks for the names, addresses and special tax stamp numbers of all such persons. Count five of the indictment charges that appellee falsely answered both of these questions "none" in a form filed on October 14, 1965 (App. 4, 11), and Count six charges that a

form that appellee filed the next day falsely stated that he had three such employees or agents (listing three names and addresses) when in fact there were more (App. 5, 12). In signing the registration forms, appellee subscribed to a declaration that "this return and/or application * * * has been examined by me and to the best of my knowledge and belief is true, correct, and complete," and the obverse of the form called attention to the penalties under 18 U.S.C. 1001 for knowingly making false statements.

We submit that the indictment properly charged violations of 18 U.S.C. 1001, and that the district court, in dismissing these counts, misinterpreted and misapplied this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62. Those cases hold only that a person who properly asserts the privilege against self-incrimination may not be prosecuted for failing to register and report information as required under the wagering tax laws. But appellee did register and report, fraudulently purporting to give correct information about his employees or agents. He is charged not under the wagering tax laws but under the False Statement Act. The policy that underlies that statute—protection of the integrity of information given to the government for official purposes—is unrelated to the interests sought to be protected by the rule in *Marchetti* and *Grosso*. That policy requires that plaintiff be punished for his false statements if a trial proves that they were in fact knowingly and willfully false.

Our brief in *Bryson* v. *United States*, No. 35, 1969 Term, which is set for consideration by the Court im-

mediately preceding the instant case, reviews in detail (pp. 12–27) the considerations and the authorities that establish the sound proposition that even a constitutionally forbidden question must be answered truthfully if it is answered at all. There, as here, it is assumed for purposes of argument that the defendant would have had a constitutional justification for refusing to make any statement at all.[1] There, as here, the prosecution was directed at enforcement of the False Statement Act and in no way at enforcement of the statutory requirement that triggered the false statement. For the reasons given in our *Bryson* brief, we submit that the rule established in *Dennis* v. *United States*, 384 U.S. 855, is correct and that it applies to a prosecution under 18 U.S.C. 1001 for making a false statement as much as it does to the "conspiracy, cynical and fraudulent" to evade the underlying statute that was involved in *Dennis*. Here, as in *Bryson* and in *Dennis* (384 U.S. at 865–866):

> * * * Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported compliance

[1] We argue alternatively in *Bryson* that the underlying statute, former Section 9(h) of the Taft-Hartley Act, 61 Stat. 136, 146, was in fact constitutional, as this Court held in *American Communication Assn.* v. *Douds*, 339 U.S. 382. But our first argument, which is pertinent to this case, is that the Court need not reach the constitutionality of that statute because the defendant is not in a position to attack it.

> with the statute designed to avoid the courts, not to invoke their jurisdiction.
>
> It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. Ample opportunities exist in this country to seek and obtain judicial protection. There is no reason for this Court to consider the constitutionality of a statute at the behest of [persons] indicted for conspiracy [or other illegal efforts] by means of falsehood and deceit to circumvent the law which they now seek to challenge. This is the teaching of the cases.[2]

It was significant in *Dennis*, as it is in *Bryson*, that the statute whose evasion was charged, Section 9(h) of the Taft-Hartley Act, had been held constitutional by this Court prior to the time of the filing of the false statements (384 U.S. at 867). So also in the instant case, when appellee filed his fraudulent registration forms in 1965, the wagering tax registration requirement carried this Court's constitutional imprimatur. *United States* v. *Kahriger*, 345 U.S. 22; *Lewis* v. *United States*, 348 U.S. 419. Although the *Marchetti* and *Grosso* decisions subsequently demonstrated that the wagering tax laws were "not immune to judicial challenge" (as this Court's decision in *United States* v. *Brown*, 381 U.S. 437, may also have suggested with respect to Section 9(h) of the Taft-Hartley Act),[3] ap-

[2] Two of the cases referred to and relied on by the Court in *Dennis*—*United States* v. *Kapp*, 302 U.S. 214, and *Kay* v. *United States*, 303 U.S. 1—are directly pertinent here and are discussed at some length in our brief in *Bryson* (pp. 15–17).

[3] In 1959 Congress repealed Section 9(h), which required officers of labor unions to execute non-Communist affidavits in

pellee, like the defendants in *Dennis* and *Bryson*, is disqualified from making the challenge in this case because of his lawless behavior. Instead of proceeding honestly upon the basis of any belief he might have had that the registration and reporting requirements were constitutionally unenforceable, by deciding not to register at all he tried to have it both ways by feigning compliance with the statute against the chance that it might continue to be constitutionally valid. As the Court held in *Dennis*, a statute, in such circumstances, "may not be circumvented by a course of fraud and falsehood, with the constitutional attack being held for use" only if the fraud is discovered (384 U.S. at 867).

The instant case differs from *Bryson* in that the claim of unconstitutionality in the statute that triggered the unlawful statement, 26 U.S.C. 4412, is founded not upon the First Amendment but upon the Fifth Amendment. We show in *Bryson* that, in the light of the factual record upon which the defendant was convicted, he can make no claim of unconstitutional vagueness in the request for information. No such contention could conceivably be made here as a defense to appellee's allegedly false statements. The questions that appellee is alleged to have answered

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order for their unions to utilize the services of the National Labor Relations Board, and substituted Section 504 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. 504), which made it a crime for any person who had been a member of the Communist Party within the previous five years to be a union officer. *Brown* held Section 504 unconstitutional as a bill of attainder (see *Dennis*, 384 U.S. at 857, n. 2, 864–865).

falsely were clear and do not remotely intrude upon protected speech, ideas or rights of association.

Moreover, it is pertinent that neither *Marchetti* nor *Grosso* held that it would be unconstitutional for the government to require those who accept wagers to register and report or to pay taxes. As the Court said in *Marchetti* (390 U.S. at 61):

> We emphasize that we do not hold that these wagering tax provisions [requiring registration and payment of the occupational tax] are as such constitutionally impermissible; we hold *only* that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for *failure* to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is *otherwise outside the privilege's protection,* nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes. [Emphasis added.]

And in *Grosso,* the Court again explicitly stated (390 U.S. at 69–70, n. 7):

> * * * We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a *criminal conviction* premised on failure to pay the tax. [Emphasis added.]

There can be no argument, then, that the questions that appellee is alleged to have answer falsely are inherently unconstitutional in themselves. Rather, *Marchetti* and *Grosso* hold only that, in view of the

statutory scheme of which those questions are a part, appellee might not have been prosecuted had he failed to file the registration form at all and properly asserted his privilege against self-incrimination. That privilege can, of course, be waived by a failure to assert it in a timely and proper manner. See, *e.g.*, *Rogers* v. *United States*, 340 U.S. 367, 372–375; *Brown* v. *Walker*, 161 U.S. 591, 597. Thus, the fact that under certain circumstances the Fifth Amendment would forbid punishment for refusing to register at all does not mean that the statutory registration requirement was beyond the government's jurisdiction. Certainly it offers no support for the proposition, upon which the district court's judgment must depend, that appellee had a license to provide deceitful information.[4]

[4] In his motion to dismiss or affirm appellee contended that the indictment does not charge any offense under 18 U.S.C. 1001 since it alleges only that he failed to answer certain questions on the forms he filed, and not that he answered any questions falsely. But counts five and six of the indictment (A. 4–6) charge not simply a mere failure to answer questions, but rather "that the number of employees and/or agents * * * [was] misrepresented and understated, in that the number, name [etc.] * * * had been omitted" from the two forms which appellee had declared to be "true, correct, and complete" to the best of his knowledge.

In any event, whether there was, in fact, only a failure to answer and whether appellee sought to assert his privilege against self-incrimination are questions which cannot be answered on the record now before the Court. The only issue presented by the dismissal of the indictment against appellee is the availability of his privilege against self-incrimination as a defense to the charge that he falsified his registration forms. Appellee has asserted matters which, if he is able to establish the necessary factual support for them, may constitute defenses to the charges against him, but this appeal is not the appropriate context for their resolution. See *United States* v. *Freuhauf*, 365 U.S. 146.

Even if the government could not constitutionally pose the questions, it would not follow that the Fifth Amendment authorizes evasive or fraudulent answers to them. Appellee chose to submit the registration form and purported to answer all of the questions on that form. He was therefore in a situation analogous to that of a defendant at a criminal trial, who may decline to testify, but who must testify truthfully if he chooses not to rely upon his privilege of silence. See *Harrison* v. *United States,* 392 U.S. 219, 222. Similarly, it is irrelevant to a perjury charge if the statutory basis for the proceedings is subsequently found unconstitutional. As this Court has said in *United States* v. *Williams,* 341 U.S. 58, 68–69:

> Though the trial court or an appellate court may conclude that the statute [under which the proceedings were brought] is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury.

The analogy that the district court drew between the charges against appellee here and the conspiracy conviction that this Court set aside in *Grosso,* together with the substantive convictions, does not withstand analysis. In *Grosso* the defendant had been convicted on fifteen counts of failure to pay the wagering excise tax in violation of 26 U.S.C. 4401, four counts of failing to pay the special occupational tax imposed by 26 U.S.C. 4411, and one count of conspiracy to commit the foregoing substantive offenses, and thereby defrauding the government of payment in violation of

18 U.S.C. 371 (390 U.S. at 63). This Court agreed with his defense that payment of the excise tax would indeed have created "real and appreciable" hazards of self-incrimination (390 U.S. at 67–69), and therefore reversed as to the excise tax counts. Finding no effective waiver of the privilege in regard to the occupational tax counts, the Court held that convictions for these violations also could not stand (*id.* at 71). The conspiracy charge, bottomed solely on allegations of evasion of the excise and occupational taxes, raised "questions identical with those presented by the substantive counts," the Court determined, and thus reversal of the substantive charges compelled dismissal of the conspiracy count (*id.* at 70).

Here, in contrast to the conspiracy count in *Grosso,* the false statement counts are not identical, or even similar, to charges of failure to file a return or pay a tax. To the extent that filing a registration form involved self-incrimination, petitioner incriminated himself by his act of filing. The false statement counts are substantive in themselves, and are not founded upon any evidence protected by the privilege against self-incrimination. They merely charge that, having decided to file a Form 11–C, appellee did so falsely, and thus violated 18 U.S.C. 1001—a provision having no connection, directly or indirectly, with the wagering tax laws. Rather, those laws simply provided the framework within which appellee allegedly committed violations of a wholly distinct criminal statute. See *Dennis* v. *United States,* 384 U.S. at 867.

In summary, we submit that this case, like its companion, *Bryson*, is governed by the firmly established principle that a defendant charged with fraud or deceit against the government has no standing to seek to justify himself by a constitutional attack on the law that provided the setting for his lawless conduct. Putting the matter in another way, no element of the charges against appellee and Bryson under the False Statement Act turns on the validity *vel non* of the governmental requirements that triggered their allegedly false statements. *A fortiori,* fraud in the course of purported compliance with a statute cannot be justified where, as in the instant case, the underlying statute is indeed valid, subject only to a properly invoked defense of the privilege against self-incrimination in a case of non-compliance. That defense to a criminal prosecution for violation of the wagering tax laws is, of course, all that *Marchetti* and *Grosso* established.[5] The counts of the indictment charging appellee with making false statements should not, therefore, have been dismissed simply because appellee could not have been prosecuted for making no statements whatsoever.

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[5] Cf. *United States* v. *United States Coin and Currency*, 393 F. 2d 499 (C.A. 7), certiorari granted, 393 U.S. 949, restored to the calendar for reargument, No. 8, 1969 Term.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and counts five and six of the indictment ordered reinstated.

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FILE COPY

NO. 17

IN THE

Supreme Court of the United States

October Term, 1969

UNITED STATES OF AMERICA, *Appellant*

v.

JAMES D. KNOX, *Appellee*

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR JAMES D. KNOX

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BRIEF FOR JAMES D. KNOX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are added to those presented by the Government:

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

UNITED STATES CODE

"26 U. S. C. 7203 Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

TEXAS PENAL CODE

"Art. 652a. Bookmaking; definition; penalty Accepting or placing wagers; punishment

Section 1. Any person who takes or accepts or places for another a bet or wager of money or anything of value on a horse race, dog race, automobile race, motorcycle race or any other race of any kind whatsoever, football game, baseball game, athletic contest or sports event of whatsoever kind or character; or any person who offers to take or accept or place for another any such bet or wager; or any person who as an agent, servant or employee or otherwise, aids or encourages another to take or accept or place any such bet or wager; or any person who directly or indirectly authorizes aids or encourages any agent, servant or employee or other person to take or

accept or place or transmit any such bet or wager shall be guilty of book making and upon conviction be punished by confinement in the State Penitentiary for any term of years not less than one (1) nor more than five (5) or by confinement in the county jail for not less than ten (10) days nor more than one (1) year and by a fine of not less than One Hundred ($100.00) Dollars nor more than One Thousand ($1,000.00) Dollars."

QUESTIONS PRESENTED

I. Whether a false statement prosecution under 18 U. S. C. 1001 can be maintained on allegations of failure to answer questions 5 (b) and 5 (c) of Internal Revenue Service Form 11-C?

II. Whether the filing of Internal Revenue Service Form 11-C - Special Tax Return and Application for Registry-Wagering prior to the decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 697 and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709 was a voluntary waiver of Appellee's Constitutional immunities under the Fifth Amendment?

III. Whether Appellee can be prosecuted under 18 U. S. C. 1001 for alleged false statements, in Internal Revenue Service Forms 11-C - Special Tax Return and Application for Registry-Wagering involuntarily filed prior to the decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 697 and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709?

STATEMENT OF THE CASE

Counts Five and Six charge that the Form 11-C Returns were filed by Knox on October 14 and 15, 1965. (Appx. 4-6). This was more than two years prior to the

decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 709 and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709.

Knox raised his Fifth Amendment plea at the trial level in his Defenses and Objections to the indictment (Appx. 6-7). He was sustained by the trial court on the authority of *Marchetti* and *Grosso.* (Appx. 8)

Counts Five and Six do not charge affirmative misstatements. They allege only defects of omissions in the Form 11-C returns:

> ". . . in that the number, name, special stamp number, street address, and city and state of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted from said Internal Revenue Service Form 11-C . . ." (Appx. 5-6).

SUMMARY OF THE ARGUMENT

I. As Counts Five and Six of the indictment do not charge affirmative false statements, but only failures to answer questions 5(b) and 5(c) of Internal Revenue Service For 11-C, the Counts do not charge offenses against the United States.

II. Knox's filing of Form 11-C Returns prior to the decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 697 and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709 was involuntary and under the compulsion of 26 U. S. C. 4412 and 7203. He therefore did not waive his Fifth Amendment immunity. He timely raised the plea by urging it as a challenge to the indictment.

III. Assuming the Form 11-C Returns contained false statements, they can not be the basis of a criminal prosecution as the Returns were involuntarily filed. They were extracted by the Government under the compulsion of 26 U. S. C. 4412 and 7203 in violation of the prohibitions of the Fifth Amendment.

ARGUMENT

I.

Neither Count Five nor Count Six of the indictment charges an affirmative false statement; they charge only failures to answer questions 5(b) and 5(c) of Internal Revenue Service Form 11-C.[1] It seems fundamental that failure to answer a question or to make a statement can not be a false statement. Consequently, the counts do not charge false and fraudulent statements under 18 U. S. C. 1001. Counsel's research has produced no Federal decisions directly on the point but state court precedents hold that charges of perjury or false statements can not be grounded on failure to make statements, no matter how material the statements, if made, may have been. *People v. French* (Calif. 1933), 26 Pac. 2d 310; *People v. Dodge* (N. Y. 1961), 12 A. D. 2d 353, 212 New York Supp. 2d 526.

The State in *People v. French,* supra, charged that the defendant filed an application to Los Angeles County for poor person relief without including with the application a list of properties in which he claimed a legal or equitable interest: ". . . And the Defendant in said affidavit did

1. Examination of the photocopy of the blank form attached as the last exhibit in the Appendix discloses that these are the questions to which Counts Five and Six refer.

willfully and intentionally fail to state the nature, location and value of all property in which he, the said Defendant, had any interest."

It was the State's contention that the failure to furnish this information, which was required by the poor relief ordinance, constituted false statements or perjury. However, the Court affirmed a dismissal of the indictment on the fundamental premise that a failure to make a statement can not be a perjurious false statement:

> "It would seem so clear that discussion should be unnecessary either to illustrate or to establish the point that a criminal action against a defendant for the commission by him of the crime of perjury can not be maintained on an allegation that in making an affidavit he failed to make a statement of any fact, however relevant or material such fact, if made, might be to the subject-matter in hand, or however mandatory the rule might be by which he was directed or required to make such statement as a prerequisite to the accomplishment of the object of the affidavit."

In *People v. Dodge,* supra, it was argued by the prosecution that certain petitions to a City Council should be construed to contain false statements, because the Ordnance under which the petition was filed required allegations of certain facts which were not stated in the petition. The Court rejected the contention, holding that charges of perjury or false statements can not be based on failures to make statements:

> "It has been argued that the petitions should be read as containing the false statements alleged to have been made because the ordinance required proof of such facts as a prerequisite to the grant of relief,

and the petitions were presented pursuant to the ordinance. As we have stated, the ordinance did not require proof; but even if it did, a failure to make the statements alleged to have been made would not have constituted perjury. Perjury is not committed by failing to make a statement of a fact, no matter how relevant or material such statement, if made, might be to the subject matter in hand, and no matter how mandatory the rule might be requiring such statement to be made as a prerequisite to the accomplishment of the purpose of an affidavit."

To construe 18 U. S. C. 1001 as contended for by the Government would result in the flagrant injustices of subjecting every citizen to a criminal prosecution whenever he failed to answer a question or fill out a blank in any of the myriad forms daily submitted by the thousands to the innumerable Governmental agencies and bureaus. It is urged such was not the intent of Congress on enacting §1001, that it did not intend to abrogate the age-old concepts of perjury or false statements and to subject a citizen to five years in prison and a $10,000. fine for failure to fill out all the blanks in an agency form.

Analogous unintended results have been avoided by the lower courts in construing §1001. It does not penalize statements as to what might be in the future; the truth or falsity of such are incapable of proof as of the time the statements are made. *Kolaski v. United States* (5th Cir.) 362 F.2d 847. Mere negative, oral answers to questions propounded by Federal investigators are not "statements" within the meaning of §1001. *Paternostro v. United States* (5th Cir.) 311 F.2d 298; *United States v. Stark* (D.C. Md.) 131 F. Supp. 88; *United States v. Levin* (D. C. Col) 133 F. Supp. 88.

II.

The indictment charges that the alleged false statements were contained in Internal Revenue Service Forms 11-C, Special Tax Return and Application for Registry-Wagering filed on October 14 and 15, 1965. This was more than two years prior to the decisions in *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709. At the times of the filings the decisions of *United States v. Kahriger,* 345 U.S. 22, 73 S.Ct. 510, and *Lewis v. United States,* 348 U.S. 419, 75 S.Ct. 415, were on the books and left untouched by *Albertson v. SACB,* 382 U.S. 70, 86 S.Ct. 194. Consequently, at the times of the filings, Knox was faced with the potentials of prosecution under 26 U.S.C.A. 7203, imprisonment for one year, and a fine of $10,000.00, if he failed and refused to file the returns in response to the requirements of 26 U.S.C.A. 4412. Under these circumstances, Knox's filings of the returns were not voluntary acts, but rather were acts under the compulsion and duress of 26 U.S.C. 4412 and 7203 as then sustained by *Kahriger* and *Lewis,* supra. Thus the filings were not the result of a free choice. See *Garrity v. State of New Jersey,* 385 U.S. 493, 87 S.Ct. 616, and the cases therein cited. There this Court held that self-incriminating statements made by police officers under threats of discharge from their employment if they claimed their Fifth Amendment immunity were given under duress and so not admissible against them:

> "Where the choice is 'between the rock and the whirlpool', duress is inherent in deciding to 'waive' one or the other. It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."

After the decisions in *Grosso* and *Marchetti* overruled *Kahriger* and *Lewis,* Knox timely raised the issue of his Constitutional immunity by his Defenses and Objections to the Indictment (Appx. 6), and the claim was sustained by the trial court. (Appx. 8) Though he earlier succumbed to compulsion, by raising the issue at the trial level he avoided a waiver. *Garrity v. State of New Jersey,* supra. His failure earlier to assert the privilege to the Treasury officials at the time he filed the returns was not an irretrievable abandonment of his Constitutional immunity. *Marchetti v. United States,* supra. Further, in *Grosso v. United States,* supra, this Court excused the failure to raise the Constitutional issue at the time of trial and permitted its being initially raised on appeal, because at the time of trial *Kahriger* and *Lewis* were authoritative:

> "Given the decisions of this Court in *Kahriger* and *Lewis,* Supra, which were on the books at the time of petitioner's trial, and left untouched by Albertson v. SACB, supra, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege."

See also the ruling in the second opinion of the Seventh Circuit in *United States v. Lookretis* (7th Cir.) 398 F.2d 64 in which it sustained a Fifth Amendment objection to the admissibility in evidence of a Form 11-C Return. Such ruling necessarily held that Lookretis had not waived his Fifth Amendment immunity by filing the Form 11-C Return prior to the decisions by this Court in *Grosso* and *Marchetti.* The first opinion by the Seventh Circuit in *Lookretis,* 385 F.2d 487, sustaining the conviction, was reversed by this Court in a per curiam opinion on the authority of *Marchetti.* See *Lookretis v. United States,* 390 U.S. 338, 88 S.Ct. 1097. Thus the history of the

Lookretis litigation establishes that a pre-*Marchetti* and *Grosso* filing of the Form 11-C Returns under the compulsion of 26 U.S.C. 4412 and 7203 as then sustained by *Kahriger* and *Lewis* is not a waiver of the Fifth Amendment immunity.

III.

It has long been established that one may not be punished criminally for a perjurious or false statement made to or before a Federal agency or committee that had no statutory authority to require the statement or testimony. *Christoffel v. United States,* 338 U.S. 84, 69 S.Ct. 1447 (Congressional Committee); *Viereck v. United States,* 318 U.S. 236, 63 S.Ct. 561 (Secretary of State); *United States v. George,* 228 U.S. 14, 33 S.Ct. 412 (United States Land office); *Williamson v. United States,* 207 U.S. 425, 28 S.Ct. 162 (General Land Office); *Brown v. United States* (8th Cir.) 245 F.2d 549 (Grand Jury); *Meyers v. United States* (D. C. Cir.) 171 F.2d 800 (Congressional Committee); *Shelton v. United States* (D.C. Cir.) 165 F.2d 241 (Department of Vehicles and Traffic of District of Columbia); *United States v. Icardi* (D.C. Cir.) 140 F.Supp. 383 (Congressional Committee).

Under the above authorities, Knox can not be prosecuted criminally for false statements, if any, contained in the Internal Revenue Service Forms 11-C—Special Tax Return and application for Wagering filed by him on October 14 and 15, 1965 if the Internal Revenue Service was not authorized to require the filing of the returns. This is answered by *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709, holding that the Fifth Amendment prohibits the Internal Revenue Service's requiring the filings.

Additionally, the applicable penal statute, 18 U.S.C. 1001 is limited to false statements as to "any matter within the jurisdiction of any department or agency of the United States." The effect of *Marchetti* and *Grosso* is that the Internal Revenue Service does not have jurisdiction to require Form 11-C Returns, that requiring the filing of such returns is not an authorized function of the Federal Government. See *United States v. Gilliland,* 312 U.S. 86, 93, 61 S.Ct. 518, 522 ("The amendment indicated the Congressional intent to protect the *authorized functions* of governmental departments and agencies. . .")

Because Knox filed the 11-C Returns involuntarily, under compulsion and duress the Government's basic authorities of *Dennis v. United States,* 384 U.S. 855, 86 S.Ct. 1840; *United States v. Kapp,* 302 U.S. 214. 58 S.Ct. 182; and *Kay v. United States,* 303 U.S. 1, 58 S.Ct. 468, are not controlling. In each of these cases the false statements were voluntarily filed for the purpose of obtaining benefits from the Government.

The Defendants in *Dennis* filed false non-Communist affidavits as a part of a conspiracy to obtain the services of the National Labor Relations Board on behalf of the International Union of Mine, Mill and Swelter Workers in purported compliance with the provisions of §9(h) of the *National Labor Relations Act.* In *Kapp* the false statements as to the identity of the producers of hogs were filed as a part of a conspiracy for the purpose of obtaining benefits under the *Agricultural Adjustment Act,* selling the hogs to the Government. In *Kay* the defendant falsely overstated the amount of her second mortgage on real estate for the purpose of obtaining more than due her from the Home Owner's Loan Corporation.

However, in neither *Dennis, Kapp* nor *Kay* were the Defendants under any compulsion or duress. They were not faced with penal sanctions for failure to file the statements. It is this circumstance that clearly distinguishes *Dennis, Kapp,* and *Kay* from Knox's case.

As demonstrated above (P. 8 to 10) at the time Knox filed the Form 11-C Returns he was faced with the compelling requirements of 26 U. S. C. 4412 as then sustained by *United States v. Kahriger,* 345 U. S. 22, 73 S. Ct. 510 and *Lewis v. United States,* 348 U. S. 419, 75 S. Ct. 415. He was additionally under the threat of criminal prosecution, imprisonment for one year, and a $10,000.00 fine if he wilfully failed or refused to file. 26 U. S. C. 7203. This Court has held that statements made under such circumstances are made under duress and so are not voluntary. *Garrity v. State of New Jersey,* 385 U. S. 493, 87 S. Ct. 616. Under the decisions in *Marchetti v. United States,* 390 U. S. 39, 88 S. Ct. 697, and *Grosso v. United States,* 390 U. S. 62, 88 S. Ct. 709, the compulsion and duress of 26 U. S. C. 4412 and 7203 was unlawful, being forbidden by the Fifth Amendment.

Is not the Government therefore here urging a novel position: That it can in violation of the Constitution by compulsive duress extract involuntary statements from a citizen and then prosecute him for falsities that may be contained in the coerced information. Does not the Government by the very urging of the point defeat itself! Does not the very statement of the point demonstrate its repugnance!

For further demonstration of this argument equate Knox's mental coercion and duress with physical torture. See *Garrity v. State of New Jersey,* supra. Then assume

that Knox made and filed false statements under the pressure of the thumb screw or the pull of the rack. Would the Government then argue that Knox could not challenge the Government's unconstitutional extraction of the statements!

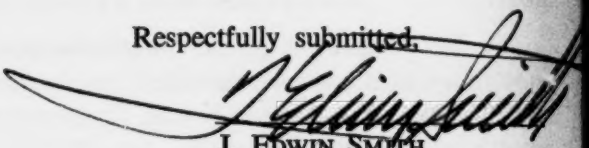
The Government required the statements from Knox in violation of its own fundamental law. It therefore comes against Knox with unclean hands. To permit the Government now to prosecute Knox for statements made in response to the Government's illegal acts would be to condone the Government's unconstitutional conduct. This the Courts have consistently refused to do under "the imperative of judicial integrity". *Mapp v. State of Ohio,* 367 U.S. 643, 81 S. Ct. 1684; *McNabb v. United States,* 318 U.S. 332, 63 S.Ct. 608. See also the concurring opinion of Mr. Justice Roberts in *Sorrells v. United States,* 287 U.S. 435, 453, 53 S.Ct. 210, 217; the dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead v. United States,* 277 U.S. 438 at Pages 469, 485, 48 S.Ct. 564 at Page 575 and *People v. Cahan,* 44 Cal.2d 434, 282 Pac. (2) 905, 50 A.L.R.2d 513.

The statements in the 11-C Forms having been unconstitutionally obtained by the Government under duress they would be inadmissible against Knox on a trial. *Garrity v. State of New Jersey,* supra; *Mapp v. State of Ohio,* supra; *McNabb v. United States,* supra; *Lookretis v. United States* (7th Cir.), 398 F.2d 64 (First opinion in 385 F.2d 487 being reversed by percuriam opinion in 390 U.S. 338, 88 S.Ct. 1097). This being so, the judgment below can be affirmed on the unavailability of necessary evidence though there has been no trial on the merits. 28 U.S.C. 2106. See *Grosso v. United States,* 390 U.S. 62, 71, 88 S.Ct. 709, 715.

CONCLUSION

Under the argument and authorities presented, it is submitted that the judgment below should in all things be affirmed.

Respectfully submitted,



J. EDWIN SMITH
Attorney for Appellee,
James D. Knox

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 17

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES D. KNOX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

Before responding to the allegations contained in appellee's brief, we reiterate that only one issue is properly before this Court in reviewing the district court's dismissal of the indictment. That issue is whether assertion of the privilege against self-incrimination provides a complete defense to the charge that appellee falsified the registration forms he filed, in violation of 18 U.S.C. 1001. Many of the claims raised in appellee's brief relate to issues which may be developed and urged at trial; this appeal does not, however, provide the appropriate context for their resolution. See *United States* v. *Fruehauf*, 365 U.S. 146.

365-807—69

1. Counts five and six do not, as appellee asserts (App. Br., p. 5), simply charge a failure to answer questions on the wagering tax forms. Rather, Count five states that appellee wilfully and knowingly caused a false statement to be made on a wagering tax registration statement (Form 11–C), filed on October 14, 1965, in that he misrepresented and understated the number of employees or agents engaged in receiving wagers on his behalf. The charge obviously refers to questions 5(b) and 5(c) on this form, requesting the applicant to state the number of such employees or agents and then list their names, addresses and special tax stamp numbers; at a trial on this charge the government would undertake to establish that appellee wrote "none" in reply to both subquestions (A. 11). On the following day appellee filed another Form 11–C and this time indicated that he had "3" employees or agents, and listed the names and addresses of three individuals: Foster, Bridges and Nichols (A. 12). In Count six, it is alleged, and the government would seek to prove at trial, that this number of employees was false (A. 4–6).

The charges in Counts five and six are clearly distinguishable from those in the cases cited by appellee which hold that the *absence* of a response to a question will not support a charge of perjury. Here a reply was in fact given; the spaces were not left blank. Had they been left blank, the district director might have regarded the forms as not having been fully executed, but he could not have been misled into believing that appellee had no employees on October 14, 1965, and only three on the following day.

An affirmative response, even the word "none", shows a conscious consideration of the matter sought by the question and a deliberate reply, which the government alleges to have been false. See *United States* v. *Zambito*, 315 F. 2d 266 (C.A. 4), certiorari denied, 373 U.S. 924.

As appellee notes (App. Br., p. 7), a few courts have fashioned an exception to the broad coverage of the False Statement Act in the case of "no" replies to questions propounded by federal agents in the course of an investigation of an individual regarded as a potential defendant. See *Friedman* v. *United States*, 374 F. 2d 363 (C.A. 8); *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5); contra, *Tzantarmas* v. *United States*, 402 F. 2d 163 (C.A. 9), certiorari denied, 394 U.S. 966; *United States* v. *Adler*, 380 F. 2d 917 (C.A. 2), certiorari denied, 389 U.S. 1006. Assuming the correctness of the "exculpatory no" exception, it manifestly is inapplicable to Count six, where appellee listed three employees. The exception is, moreover, equally inappropriate to control the disposition of Count five. Those jurisdictions which have adopted this exception to the broad scope of the term "statement" have restricted its application to false denials made to federal agents in the course of an investigation directed against a potential defendant who did not initiate the contact with the government and was not seeking any form of governmental privilege or benefit (see *Paternostro* v. *United States, supra*, 311 F. 2d at 309). Appellee's situation does not fall within that limited exception. See also *Blake* v. *United States*, 323

F. 2d 245 (C.A. 8); *Ogden* v. *United States*, 303 F. 2d 724 (C.A. 9); *Frasier* v. *United States*, 267 F. 2d 62 (C.A. 1); *Pitts* v. *United States*, 263 F. 2d 353 (C.A. 9), certiorari denied, 360 U.S. 935.

2. Appellee's suggestion (App. Br., p. 8) that he was entitled to falsify his tax forms because he was compelled by law to file them is untenable. The "coercion" referred to by appellee did not involve any custodial interrogation, or the use of physical intimidation or psychological trickery threatening the reliability of the fact-finding process. Rather, it involved only the impersonal, uniformly applied requirement, addressed to the public at large, that individuals who conduct a wagering business pay a tax and submit certain information to assist in the proper administration of the taxing scheme. See *Mackey* v. *United States*, 411 F. 2d 504 (C.A. 7).

The "rock-whirlpool" dilemma which appellee seeks to invoke (see App. Br., p. 8) was not relevant to his determination whether to give true or inaccurate responses to the questions on the tax forms. Such a dilemma arises instead with regard to the decision whether to file (and face possible prosecution under State gambling laws) or not to file (and face possible prosecution under 26 U.S.C. 7203). Had appellee not filed, he would plainly have had a complete defense to a criminal prosecution under 26 U.S.C. 7203 under *Marchetti-Grosso*.[1] Correspondingly, had he filed accu-

[1] The government recognized this fact by stating in the district court that it would not pursue the charges in the indictment relating to appellee's complete failure to file and by not seeking to appeal the dismissal of those counts.

rate information and, as a result, been subjected to State prosecution, he would also be in a position, at least presumably, to assert the privilege as a complete defense. Cf. *Malloy* v. *Hogan,* 378 U.S. 1; *Murphy* v. *Waterfront Commission,* 378 U.S. 52. But he cannot assert that he had a license to lie.

3. There is no doubt that the Internal Revenue Service has the authority to require the filing of tax returns. This authority has not been defeated in the matter of wagering tax returns by *Marchetti-Grosso,* for this Court specifically stated that it was not invalidating the wagering tax structure (*Grosso* v. *United States,* 390 U.S. 62, 69–70). Accordingly, the jurisdictional element of the indictment against appellee is fully justified. Indeed, there has never been any reason to believe that "the administration of the tax laws and the collection of taxes is not one of the processes of government which the (false statement) statute was designed to protect," and that "making false statements about taxes to the representatives of the Treasury is not the kind of interference and obstruction which the statute was intended to prevent." *United States* v. *McCue,* 301 F. 2d 452, 455 (C.A. 2), certiorari denied, 370 U.S. 939. See also *Knowles* v. *United States,* 224 F. 2d 168, 172 (C.A. 10).

Nor is an indictment under 18 U.S.C. 1001 invalid because a defendant may be able to establish that he derived no personal benefit from the deceptive practice. The False Statement Act is intended to protect the authorized functions of government agencies from the filing of fraudulent information whether or not

pecuniary or property losses result. *United States* v. *Gilliland,* 312 U.S. 86, 92–93. It is perhaps arguable that the absence of benefit might constitute some defense to the charge, but this appeal is not the appropriate context to resolve that question. See *United States* v. *Fruehauf, supra.* In any event, substantial pecuniary benefits (*i.e.,* reduced tax obligations) can be derived from fraudulently understating the number of employees in a gambling operation. That conduct, therefore, might well obstruct the proper administration of a valid taxing measure (*United States* v. *Zambito,* 315 F. 2d 266, 269 (C.A. 4), certiorari denied, 373 U.S. 924), and thus falls within the scope of 18 U.S.C. 1001.

CONCLUSION

For the foregoing reasons and the reasons set forth in our principal brief, the judgment below should be reversed and Counts five and six of the indictment ordered reinstated.

Respectfully submitted.

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OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1969

United States, Appellant, *v.* James D. Knox.	On Appeal from the United States District Court for the Western District of Texas.

[December 8, 1969]

Mr. Justice Harlan delivered the opinion of the Court.

Appellee Knox has been charged with six counts of violation of federal law in connection with his wagering activities. The first four counts of the indictment charge that between July 1964 and October 1965 he engaged in the business of accepting wagers without first filing Internal Revenue Service Form 11-C, the special return and registration application required by § 4412 of the Internal Revenue Code of 1954, and without first paying the occupational tax imposed by § 4411 of the Code. Counts Five and Six charge that when Knox did file such a form on October 14, 1965, and when he filed a supplemental form the next day, he knowingly and willfully understated the number of employees accepting wagers on his behalf—in violation of 18 U. S. C. § 1001, a general criminal provision punishing fraudulent statements made to any federal agency.

Knox moved to dismiss the indictment, asserting that this Court's decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), had held invalid[1] the provisions of the wagering tax laws that required him to file the special return. The Government in response stated that it would not pursue the first four counts but argued that Knox's objections based on the *Marchetti* and *Grosso* decisions

[1] But see nn. 3, 6, *infra*.

were "largely irrelevant" to Counts Five and Six. The District Court disagreed. It dismissed all six counts, reasoning that Knox could not be prosecuted for his "failure to answer the wagering form correctly" since his Fifth Amendment privilege against self-incrimination would have prevented prosecution for "failure to answer the form in any respect." (Unreported memorandum.) The United States filed a direct appeal to this Court from the dismissal of the two counts charging violations of § 1001, and we noted probable jurisdiction, 394 U. S. 971 (1969).[2]

[2] Such a direct appeal is authorized by the Criminal Appeals Act, 18 U. S. C. § 3731, which provides: "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances: From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . . From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. . . ." The District Court sustained the claim of privilege not on the basis of facts peculiar to this case but on the basis of its conclusion that the Fifth Amendment provides a defense to any prosecution under § 1001 based on misstatements on a Form 11–C. This amounts to a holding that § 1001, as applied to this class of cases, is constitutionally invalid. The generality of the impact of the District Court's holding appears to us to render our jurisdictional holding *a fortiori* to analogous jurisdictional holdings in such cases as *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Fleming* v. *Rhodes*, 331 U. S. 100, 102–104 (1947); *Wissner* v. *Wissner*, 338 U. S. 655 (1950); *Department of Employment* v. *United States*, 385 U. S. 355, 356–357 (1966). We prefer to rest our jurisdiction on this aspect of § 3731 rather than, as advocated by the Government, the statute's "motion in bar" provision, in light of the fact that the scope of the latter provision will be the subject of full-dress consideration, as will certain problems under the "dismissing any indictment" provision not present in this case, in *United States* v. *Sisson*, consideration of jurisdiction postponed, — U. S. — (1969) (No. 305).

In *Bryson* v. *United States*, — U. S. — (1969), decided today, we reaffirmed the holding of *Dennis* v. *United States*, 384 U. S. 855 (1966), that one who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself. *Bryson*, like *Dennis*, involved § 9 (h) of the Taft-Hartley Act, which was attacked as an abridgment of First Amendment freedoms and as a bill of attainder forbidden by Art. I, § 9, of the Constitution. In contrast, Knox alleges infringement of his Fifth Amendment privilege against self-incrimination. We do not think that the different constitutional source for Knox's claim removes his case from the ambit of the principle laid down in those decisions. The validity of the Government's demand for information is no more an element of a violation of § 1001 here than it was in *Bryson*.[3]

The indictment charges that the forms Knox filed with his District Director contained false, material in-

[3] Knox argues that his false Forms 11–C were not filed "in any matter within the jurisdiction of any department or agency of the United States," a necessary element of a violation of § 1001, because *Marchetti* and *Grosso* held that the Internal Revenue Service was not authorized to require the filing of the forms. Even if his reading of those decisions were correct, his argument would fail for the reasons explained in *Bryson*. The Internal Revenue Service has express statutory authority to require the filing, and when Knox submitted his forms this Court had held that such a requirement raised no self-incrimination problem. *United States* v. *Kahriger*, 345 U. S. 22 (1953); *Lewis* v. *United States*, 348 U. S. 419 (1955). Further, in *Marchetti* we did not hold that the Government is constitutionally forbidden to direct the filing of the form, but only that a proper assertion of the constitutional privilege bars prosecution for failure to comply with the direction. See n. 6, *infra*; see also *Grosso* v. *United States*, *supra*, 390 U. S., at 69–70, n. 7.

formation,[4] an accusation that concededly falls within the terms of § 1001. However, Knox claims that the Fifth Amendment bars punishing him for the filings because they were not voluntary but were compelled by §§ 4412 and 7203 of the Internal Revenue Code. He points out that if he had filed truthful and complete forms as required by § 4412, he would have incriminated himself under Texas wagering laws. On the other hand, if he had filed no forms at all, he woud have subjected himself to criminal prosecution under § 7203.[5] In choosing the

[4] Knox claims on appeal that neither Count Five nor Count Six charges any affirmative misstatements, but only omissions. Count Five charges that the statements on the form filed on October 14, 1965, "were not true, correct and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and understated, in that the number, name, special stamp number, street address, and city and State of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted. . . ." Count Six contains language identical except for an apparently inadvertent difference in punctuation. Although the wording is not entirely clear, we need not decide whether on a fair reading the indictment encompasses affirmative misstatements. The District Court read the indictment as alleging that Knox violated § 1001 "by willfully and knowingly making a false statement" on the forms, and it was on the basis of this construction that the court dismissed Counts Five and Six. We have no jurisdiction on this direct appeal to review the construction of the indictment. *E. g., United States* v. *Harriss*, 347 U. S. 612 (1954); *United States* v. *Petrillo*, 332 U. S. 1 (1947); *United States* v. *Borden Co.*, 308 U. S. 188, 193 (1939). But see *United States* v. *CIO*, 335 U. S. 106 (1948). See also n. 2, *supra*.

[5] Title 26 U. S. C. § 7203 provides: "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties

third alternative, submission of a fraudulent form, he merely opted for the least of three evils, under a form of duress that allegedly makes his choice involuntary for purposes of the Fifth Amendment.

For this proposition Knox relies on *United States* v. *Lookretis*, 398 F. 2d 64 (C. A. 7th Cir. 1968), where, after this Court had remanded for reconsideration in light of *Marchetti*, see 390 U. S. 338 (1968), the Court of Appeals ruled that truthful disclosures made under the compulsion of § 4412 could not be introduced against their maker in a criminal proceeding. However, the Fifth Amendment was offended in *Lookretis* precisely because the defendant *had* succumbed to the statutory compulsion by furnishing the requested incriminatory information. Knox does not claim that his prosecution is based upon any incriminatory information contained in the forms he filed, nor that he is being prosecuted for a failure to supply incriminatory information. He has taken a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take.

This is not to deny that the presence of §§ 4412 and 7203 injected an element of pressure into Knox's predicament at the time he filed the forms. At that time, this Court's decisions in *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955), established that the Fifth Amendment did not bar prosecution for failure to file a form such as 11–C. But when Knox responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion. Knox's ground for complaint is not that his false information

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provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

inculpated him for a prior or subsequent criminal act; rather, it is that under the compulsion of §§ 4412 and 7203 he *committed* a criminal act, that of giving false information to the Government. If the compulsion was unlawful under *Marchetti*,[6] Knox may have a defense to this prosecution under the traditional doctrine that a person is not criminally responsible for an act committed under duress. See generally Model Penal Code §§ 2.09, 3.02 (Proposed Official Draft, 1962); *id.*, § 2.09, Comment (Tent. Draft No. 10, 1960). It is only in this sense that there is any relevance to Knox's attempted distinction of this case from *Dennis*, *Bryson*, and their predecessors, *United States* v. *Kapp*, 302 U. S. 214 (1937), and *Kay* v. *United States*, 303 U. S. 1 (1938), on the ground that in those cases the false statements were voluntarily filed for the purpose of obtaining benefits from the Government.

Knox argues that the criminal sanction for failure to file, coupled with the danger of incrimination if he filed truthfully, was more coercive in its effect than, for example, the prospect that the petitioners in *Dennis* would lose their jobs as union officers unless they filed non-Communist affidavits. While this may be so, the question whether Knox's predicament contains the seeds of

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[6] We stressed in *Marchetti* "that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with these requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes." 390 U. S., at 61. Nothing before us indicates that the hazard of incrimination faced by Knox was less substantial than that faced by Marchetti, or that Knox would have been disqualified for any other reason from asserting the privilege in defense of a prosecution for failure to comply with § 4412.

a "duress" defense, or perhaps whether his false statement was not made "willfully" as required by § 1001, is one that must be determined initially at his trial.[7] It is not before us on this appeal from dismissal of the indictment, and we intimate no view on the matter.

The judgment of the District Court is

Reversed.

[7] Rule 12 (b)(1) of the Federal Rules of Criminal Procedure, which cautions the trial judge that he may consider on a motion to dismiss the indictment only those objections that are "capable of determination without trial of the general issue," indicates that evidentiary questions of this type should not be determined on such a motion.

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1969

United States, Appellant, *v.* James D. Knox.	On Appeal from the United States District Court for the Western District of Texas.

[December 8, 1969]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

In this case, as in *Bryson* v. *United States, ante*, p. —, the relevant inquiry is whether "constitutionally speaking it was 'within the jurisdiction' " of a government agency to require the filing of certain information. *Id.*, at — (dissenting opinion). In *Marchetti* v. *United States*, 390 U. S. 39, 61, we held that the statutory requirement of filing Internal Revenue Service Form 11–C is not unconstitutional *per se*. It is clear, however, that under *Marchetti, supra*, and *Grosso* v. *United States*, 390 U. S. 62, the "jurisdiction" of the Internal Revenue Service to require this form to be filed is subject to the Fifth Amendment privilege against self-incrimination.

This is not a case where an individual, with knowledge that he has a right to refuse to provide information, nonetheless provides false information. Under the decisions in *United States* v. *Kahriger*, 345 U. S. 22, and *Lewis* v. *United States*, 348 U. S. 419, which were controlling at the time Knox filed his wagering form, Knox faced prosecution under 26 U. S. C. § 7203 for failure to file the form, despite claims of self-incrimination. The Government's requirement to file the wagering form was unconditional. The majority argues that by the terms of *Marchetti* the Government is not prohibited from requesting the form, but is only prohibited from prosecuting an individual for his failure to comply with

the request. *Ante,* at —, n. 3. The question in this case, however, is not whether the Government has the power to *request* the form to be filed, but whether it has the power to *require* the form to be filed. If Knox had merely been requested to file the form and, with full knowledge of his right to silence under the Fifth Amendment, had done so voluntarily, we would have quite a different case. That is not this case. Under the scheme then in effect, the Government demanded unconditionally that Knox file the form, regardless of the fact that it would incriminate him. Heavy penalties were placed on a failure to file the form.

Marchetti and *Grosso* held that those in Knox's position have the Fifth Amendment right to remain silent irrespective of the statutory command that they submit forms which could incriminate them. Had Knox asserted his right of silence under the Fifth Amendment, it is clear that the Internal Revenue Service could not, consistent with *Marchetti* and *Grosso,* have required him to file the wagering form.* Thus any argument that the Internal Revenue Service did have "jurisdiction" to require the form to be filed in this case would have to rest on a theory that Knox had "waived" his Fifth Amendment right by not asserting it in lieu of filing the form. A similar claim was made in *Grosso,* where the petitioner had not asserted his Fifth Amendment right as to certain counts which concerned his failure to pay the special occcupational tax imposed by 26 U. S. C. § 4411. The Court there said:

> "Given the decisions of this Court in *Kahriger* and *Lewis, supra,* which were on the books at the time

* As the majority opinion states: "Nothing before us indicates that the hazard of incrimination faced by Knox was less substantial than that faced by Marchetti, or that Knox would have been disqualified for any other reason from asserting the privilege . . . ." *Ante,* at —, n. 6.

> of petitioner's trial, and left untouched by *Albertson* v. *SACB* [382 U. S. 70], we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege." 390 U. S., at 71.

That reasoning is equally applicable here, for *Kahriger* and *Lewis* were still on the books at the time Knox filed his form. And see *Leary* v. *United States*, 395 U. S. 6, 27–29.

For the reasons stated in my dissent in *Bryson, ante*, p. —, and in MR. JUSTICE BLACK's dissent in *Dennis* v. *United States*, 384 U. S. 855, 875, if the Internal Revenue Service had no constitutional authority to require Knox to file any wagering form at all, his filing of a form which included false information in no way prejudiced the Government and is not, in my view, a matter "within the jurisdiction" of the Internal Revenue Service.

I would affirm the judgment below.